Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 79-209

J. C. BENEFIELD,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE AND APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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The State of Florida, Respondent, files this response as directed by this Court and moves that the writ of certiorari be denied.

OPINIONS BELOW

The opinion of the Florida District Court of Appeal, Second District, is reported at 351 So.2d 56 and

appears in the Petitioner's Appendix as "1a-2a". The order of the Florida Supreme Court, dated December 21, 1978, declining to issue a writ of certiorari to the Florida District Court of Appeal appears in the Petitioner's Appendix as "3a-10a". The order of the Florida Supreme Court, dated April 20, 1979, denying rehearing appears in the Petitioner's Appendix as "11a-12a".

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW IN HIS TRIAL FOR ATTEMPTED BRIBERY OF THE

ADMINISTRATIVE JUDGE OF THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA, WHEN THE TRIAL JUDGE DECLINED TO RECUSE HIMSELF?

II.

WHETHER THE TRIAL COURT PROPERLY ADMITTED WARRANTLESS TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN PETITIONER AND THE GOVERNMENT'S KEY WITNESS?

III.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO EXCUSE A JUROR?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution which provides in relevant part:

> . . . nor shall any State deprive any person of life, liberty or property without due process of law.

The Fourth Amendment to the United States Constitution which provides:

> The right of the people to be secure in their persons, houses, papers and affects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND FACTS

The facts are sufficiently set forth in the petition for writ of certiorari filed in this Honorable Court (Petition at pages 3-12) and will not be repeated here except to add the following:

1) The second judge (Andrews),

appointed to preside over Petitioner's trial, specifically denied prejudice for or against either party.

2) Judge Fogle gave his consent to the recording of his conversations with Petitioner, and testified to this consent at trial.

ARGUMENT

I.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW IN HIS TRIAL FOR ATTEMPTED BRIBERY OF THE ADMINISTRATIVE JUDGE OF THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA, WHEN THE TRIAL JUDGE DECLINED TO RECUSE HIMSELF?

Florida adequately provides for the protection of Petitioner's constitutional rights. Fla. R. Crim. P. 3.230 [A.1a-3a] provides for the

disqualification of the judge assigned to try a cause when the judge is prejudiced against the movant or in favor of the adverse party. Defendant's motion must be in writing, supported by affidavits setting forth the grounds for disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself. After the first judge is disqualified, another judge is assigned to act in lieu of the disqualified judge. He should not be disqualified on account of alleged prejudice unless he shall admit that he cannot stand fair and impartial between the parties.

In the instant case, the second judge (Andrews) specifically denied prejudice for or against either party,

and the defense failed to demonstrate otherwise.

Petitioner's primary motive for presenting this claim appears to be to have this Court review the evidence pertaining to his claim. This is contrary to the Court's holding in *United States v. Johnson*, 268 U.S. 220 (1925).

Respondent would submit that Petitioner's claim fails to present a substantial federal question, which would justify review by the Court. The question presented is not novel to the Court. Respondent would, therefore, urge that the question presented is so insubstantial as not to need further argument. *Del Poso v. Wilson*, 269 U.S. 82 (1925).

II.

WHETHER THE TRIAL COURT PROPERLY ADMITTED WARRANTLESS TAPE RECORDINGS OF TELEPHONE CONVERSATIONS BETWEEN PETITIONER AND THE GOVERNMENT'S KEY WITNESS?

Petitioner alleges that his Fourth Amendment Rights were violated because warrantless electronic recordation of his telephone conversations were introduced into evidence. Petitioner's allegation is totally without foundation.

In *Lopez v. United States*, 373 U.S. 427 (1963), the Court upheld a government agent's warrantless and unconsented recordation of his conversation with a bribery suspect, holding that the risk that Petitioner took in offering a bribe to an agent

fairly included the risk that the offer would be accurately reproduced in court, whether by faultless memory or mechanical recording.

Where one party to a telephone conversation consents to the taping of that conversation, the Fourth Amendment to the United States Constitution is not compromised. *United States v. White*, 401 U.S. 745 (1971).

In *United States v. White, supra*, the Court again noted that:

> ". . . one contemplating illegal activities must realize and risk that his companion may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts or allays them, or risks what doubt he has, the risk is his. . . ."
>
> (401 U.S. 752)

See *Lewis v. United States*, 385 U.S.

206 (1966) and *Hoffa v. United States*, 385 U.S. 293 (1966).

Furthermore, Fed. R. Crim. P. 18 USC 2511(2)(c) specifically provides that a person acting under color of law may intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to the interception.

In the instant case, Judge Fogle gave his consent to the recordings of his conversations, and testified to this consent at trial. The circumstances in the present case do not support Petitioner's contention that his Fourth Amendment Rights were violated. No constitutional deprivation exists.

III.

WHETHER PETITIONER WAS DENIED HIS RIGHT TO DUE PROCESS OF LAW BY THE TRIAL COURT'S REFUSAL TO EXCUSE A JUROR?

Petitioner contends that he was denied due process of law because the trial judge refused to excuse juror Mercer. Petitioner's contention is utter nonsense.

While the constitutional standard of fairness requires that a defendant have a panel of impartial, "indifferent jurors," qualified jurors need not be totally ignorant of the facts and issues involved. *Irvin v. Dowd*, 366 U.S. 717 (1961)

As this Court observed:

> " . . .In these days of swift, widespread and diverse methods of communication, an important

case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. . ."

Id. at 723, 6 L.Ed. 2d 751, 81 S.Ct. 1639.

In *Reynolds v. United States*, 98 U.S. 145, (1878), the Court held that the burden is upon the Petitioner to demonstrate the existence of actual prejudice in the mind of the juror that would raise a presumption of partiality. Otherwise, the juror need not be set aside. *Reynolds, supra.*

In the instant case, the trial court was satisfied that juror Mercer could put aside any possible prejudice and decide the case on the evidence. This conclusion is supported by the following circumstances:

1) Juror Mercer was a college graduate with a degree in engineering giving rise to the inference that he was capable of dealing with abstract concepts.

2) Mr. Mercer was not sure that he had formed an opinion based on the news accounts, but in fairness admitted that he might have been prejudiced against the defendant. Mercer was initially certain that he could reach a verdict from the evidence alone.

3) Mr. Mercer did not take anything he read in the newspaper

personally and he could not remember anything specific in the news accounts which generated his possible prejudice.

4) Juror Mercer remained convinced that he could return a verdict based solely on the evidence and that he was not currently prejudiced against the defendant.

The voir dire in this case indicates no hostility to Petitioner by the jurors who served in his trial, as to suggest a partiality that could not be laid aside. *Murphy v. Florida*, 421 U.S. 794 (1975). Petitioner has failed to sustain his burden of demonstrating actual prejudice. The circumstances of this case do not support the conclusion that the trial court abused its discretion. No constitutional deprivation exists.

CONCLUSION

WHEREFORE, based upon the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Respondent, and a member of the Bar of the United States Supreme Court, hereby certify that on 6th

day of November, 1979, I served three copies of the Response and Appendix to the Petition for Writ of Certiorari on Roger E. Zuckerman, Esquire, Zuckerman, Spaeder & Taylor, 1800 M Street, N.W., Suite 375 North, Washington, D.C. 20036, by a duly addressed envelope with postage prepaid.

Charles Cooper

APPENDIX

APPENDIX

VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE

Rule 3.230. Disqualification of Judge

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity within the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable law or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(e) When the prosecuting attorney or defendant shall have suggested the disqualification of a trial judge and an order shall have been made admitting the disqualification of such judge, and another judge shall have been assigned to act in lieu of the judge so held to be disqualified the judge so assigned shall not be disqualified on account of alleged prejudice against the party making the motion in the first instance, or in favor of the adverse party, unless such judge shall admit and hold that it is then a fact that he, the said judge, does not stand fair and impartial between the parties and if such judge shall hold, rule and adjudge that he does stand fair and impartial as between the parties and their respective interest, he shall cause such ruling to be entered

on the minutes of the court. The ruling of such judge may be reviewed by the appellate court, as are other rulings of the trial court.